Supreme Court, U.S.
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No. 06- 06-625

IN THE

Supreme Court of the United States

BRIAN DUNN,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a railcar go "out of use" so as to fall outside the protection of the Safety Appliance Act, 49 U.S.C. § 20302(a), when it is deposited by a railroad at a manufacturing facility to later be loaded along with other cars by employees and agents of that manufacturing facility?

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Petitioner Brian Dunn respectfully petitions for a writ of certiorari to review the judgment in the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals was not reported. It is reproduced in the Appendix at App. 1a, along with the Order of the Court of Appeals denying the timely filed Petition for Rehearing, reproduced at App. 17a. The opinion of the District Court granting Respondent's Motion for Summary Judgment is unreported, and it is reproduced at App. 2a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 2006. (App. 1a) A timely petition for rehearing was denied on July 31, 2006. (App. 17a) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Safety Appliance Act, 49 U.S.C. § 20302(a)-(a)(2), provides that "a railroad carrier may use or allow to be used on any of its railroad lines . . . a vehicle only if it is equipped with secure grabirons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling [cars]. . . ."

STATEMENT

Petitioner seeks review of a ruling of the Eleventh Circuit Court of Appeals which affirmed, without opinion, the grant of summary judgment by the District Court of the Southern District of Georgia. The District Court ruled that a CSX railcar on which Petitioner, a railway worker, was injured was "out of use" at the time of the injury and because out of use, the car falls outside the protection of the Safety Appliance Act. The District Court therein ruled, as a matter of law, that because the Safety Appliance Act was not applicable, no claim was properly asserted by Petitioner against CSX for negligence *per se* secondary to any violation of the Safety Appliance Act. The District Court thereupon granted CSX's Motion for Summary Judgment on Petitioner's claim against CSX for negligence *per se* and denied Petitioner Dunn's Cross-Motion for Partial Summary Judgment on this same issue.

Petitioner seeks review of the Eleventh Circuit's ruling because it is in conflict with the rulings of this Court in *Brady v. Terminal Ry. Assoc. of St. Louis*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614 (1936); *United States v. Northern Pacific Ry Co.*, 254 U.S. 251 (1920); *United States v. Seaboard Air Line R.R. Co.*, 361 U.S 78, 83 (1959); and others. It is also in conflict with the rulings of several other circuits, including decisions of the Fourth and Fifth Circuits, i.e., *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260 (4th Cir. 1980); *Monongahela Ry. Co. v. Black*, 235 F.2d 406 (4th Cir. 1956); *Trinidad v. Southern Pacific Transportation Co.*, 949 F.2d 187 (5th Cir. 1991). The Courts in those circuits have held, or otherwise recognized, that the protection of the Act remains in place while the car is in use prior to

reaching its final destination, and the car does not go "out of use" merely because dropped off at an industrial facility to be loaded or unloaded pending continuation of its journey.

The case arises out an injury to Petitioner Dunn which occurred on the evening of January 17, 2003, at a paper mill owned and operated by International Paper ("IP") in Savannah, Georgia. At that time, Mr. Dunn was employed by RailServe Corporation, RailServe having a contract with IP to move railcars within the IP mill in Savannah after those cars are dropped off by various railroads to be loaded or unloaded. The mill is extremely large, covering several square miles. International Paper does not move railcars on its premises, but instead, depends entirely on RailServe to move cars around the mill, including moving cars into position to be loaded and unloaded. In so doing, RailServe uses its own employees and locomotives to move the cars.

Mr. Dunn, in his capacity as conductor/switchman for RailServe, was injured while attempting to climb onto CSX boxcar #11635, which he contends was delivered to the mill by CSX with a loose and defective grabiron/ladder rung. Immediately after his injury, the grabiron was examined and it was determined that it was missing its retaining bolt on one end, allowing the rung to pull away from the side of the car as Mr. Dunn attempted to climb onto the car. He contends that he was injured as the ladder rung pulled away from the car, requiring him to dangle by one hand from the side of the car until the train could be brought to a stop.

It was undisputed below that CSX has a duty under Federal Railway Administration regulations to perform an "outbound" inspection of its railcars before they leave the CSX railyard to be taken to their destination, including in

this case, International Paper. This outbound inspection is required to be performed by F.R.A.-certified car inspectors employed by CSX and is performed in CSX's own railyard prior to the cars' departure. In this pre-departure inspection, the cars are inspected for brake violations and other Safety Appliance Act violations in accordance with F.R.A. regulations. The evidence is that each car is not individually inspected, but rather, the cars are inspected as part of an assembled train. The inspection is made by way of a certified car inspector, employed by the railroad, walking down the tracks alongside the assembled train, visually inspecting all cars as he walks past. This CSX car was purportedly so inspected prior to its departure for IP from the CSX railyard.

It is important to note that once CSX performs its "outbound" inspection, the cars do not undergo another mechanical inspection until they are received back by CSX in its railyard at the completion of the trip. Like the earlier outbound inspection, this "inbound" inspection is also a mechanical inspection performed by CSX-certified car inspectors for Safety Appliance Act violations.

In this regard, the cars are not inspected mechanically on IP premises. Neither RailServe nor IP perform mechanical inspections to determine if cars contain safety appliance violations. Those entities employ no F.R.A.-certified rail car inspectors. In fact, the car would normally not receive another mechanical inspection by a car inspector until its "inbound" inspection, which would be made by CSX at the termination of its trip, back at CSX's yard. Though CSX rail transportation crews, who actually man the trains between destinations, are generally instructed to report defects in cars if observed during the course of a trip, they do not perform mechanical inspections as required by F.R.A. regulations of

cars. The same is true of RailServe employees. They too are trained, if they see a defect in the course of their duties, to report it. They are not trained or certified, however, to perform actual mechanical inspections of cars.

After being dropped off at IP by the CSX transportation crew, the car remained in IP's holding yard for approximately twelve (12) days. There is no evidence that it was ever removed from the holding yard until Petitioner Dunn and two other RailServe employees were assigned on the evening of January 17, 2003, to move the CSX car and a number of other empty cars from the IP holding yard and to transport those cars, by use of a RailServe locomotive, to the IP mill for loading, about a mile away. At that point, this small train was assembled by Mr. Dunn and his two RailServe crew members and was taken out of the IP holding yard, whereupon the train proceeded back onto the CSX mainline track en route to the IP mill.

It was undisputed that trains have to leave IP's holding yard and then reenter CSX-owned tracks for some distance prior to reaching the IP mill. Once at the mill, the train again leaves the CSX tracks and proceeds onto IP-owned tracks which run into the mill itself. Though IP/RailServe has the right to utilize the CSX track for movement of its cars pursuant to a lease, it was undisputed that CSX also uses this particular track, and that IP/RailServe trains thereon remain subject to direction from CSX's terminal yard tower and are subject to CSX's operating rules while thereon. It was on this trip on the CSX track that the injury occurred. Specifically, it occurred when Mr. Dunn, who had jumped down to flag a public road crossing, attempted to pull himself back up onto the car by use of what turned out to be the defective handhold.

On May 26, 2005, the United States District Court for the Southern District of Georgia granted summary judgment to CSX on all of Petitioner Dunn's claims, finding as a matter of law that the railcar was "out of use" at the time of Mr. Dunn's injury, so as to exclude it from coverage of the Safety Appliance Act, and further finding that Dunn had not set forth a claim for actionable negligence against CSX for failing to properly inspect this railcar prior to its delivery to International Paper premises.

Brian Dunn appealed the decision of the District Court to the Eleventh Circuit Court of Appeals. There, the Eleventh Circuit Court of Appeals affirmed the decision of the District Court without opinion. The Eleventh Circuit subsequently denied the Petition for Rehearing *En Banc*, or Alternatively, for Reconsideration, also filed by Petitioner Dunn.

REASONS FOR GRANTING OF THE PETITION

A. The Decision in the Court Below Is At Odds With Established Supreme Court Precedent.

Petitioner Brian Dunn would submit that the District Court's ruling, to the effect that this railcar was out of use at the time of Mr. Dunn's injury, is contrary to the holdings in *Brady v. Terminal Ry. Assoc. of St. Louis*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614 (1936); *United States v. Northern Pacific Ry. Co.*, 254 U.S. 251 (1920); *United States v. Seaboard Air Line R.R. Co.*, 361 U.S 78, 83 (1959). It is also contrary to the decisions of courts in other circuits, among which include *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260 (4th Cir. 1980); *Monongahela Ry. Co. v. Black*, 235 F.2d 406 (4th Cir. 1956).

The Safety Appliance Act, 49 U.S.C. § 20302(a), mandates that railcars must be equipped with certain safety appliances such as properly affixed grabirons, secure sill steps, automatic couplers, automatic brakes, and the like, for the protection of rail workers called upon to use or climb onto railcars. Under that Act, if a railworker is injured or killed as the result of a defective safety appliance, the railroad using the car or allowing the car to be used on its rail line becomes liable to that worker without the necessity of proving negligence on the part of the railroad. Though the Safety Appliance Act creates no independent cause of action for workers injured due to violation of the Act, a violation may be found to constitute negligence *per se* when a cause of action otherwise exists. *E.g., Crane v. Cedar Rapids & I.C. Ry.*, 395 U.S. 164, 166, 89 S. Ct. 1706, 23 L. Ed. 2d 176 (1969); *Brasier v. Norfolk Southern Ry. Co., Inc.*, 896 So. 2d 471 (Ala. 2004). Here, it was alleged that the violation of the Act rendered CSX negligent *per se* pursuant to Georgia tort law.

An exception to the Safety Appliance Act has been carved out, however, for occasions when a car is not "in use" at the time of an injury. If a car is found to be "out of use", the Act is generally held to be inapplicable. The term not "in use" was traditionally limited to instances where a car was temporarily taken out of service for repair or maintenance. Under those circumstances, if the car is being repaired or stored for later repair, no action will lie for violation of the Act because the railroad has not yet had opportunity to remedy the defect. *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Horibin v. Providence & Worcester Ry. Co.*, 352 F. Supp. 2d 116 (2005).

This exception to the Act was later expanded such that railcars were held to be not in use during "switching operations" at the beginning or end of a trip. A switching operation is the process where train cars are coupled together or taken apart in the railroad switching yard, either prior to the train leaving the yard at the commencement of a trip, or upon arrival back at the yard at the end of a trip. Such switching operations generally precede inspection for Safety Appliance Act violations before the trip commences, or at the end of the trip, when the cars return from their journey. *See Williams v. Norfolk Southern Ry. Co.*, 126 F. Supp. 2d 986 (W. D. Va. 2000).

The stated rationale for this "switching" exception is that it would be unfair to the offending rail carrier to penalize it for Safety Appliance Act violations when the train is still being built before commencing a trip or is being broken apart at the end of a trip, and the railroad thus has not yet had an opportunity to inspect the car to discover such violations. *United States v. Seaboard Air Line Ry. Co.*, 361 U.S. 78, 80 S. Ct. 12, 16, 4 L. Ed. 2d 25 (1959);*Angell v. Chesapeake & Ohio Ry. Co., supra.*

These switching operations, which fall outside the scope of the Act, generally are held to continue until the railroad has had a reasonable opportunity to conduct a pre-departure or post-departure inspection for Safety Appliance Act defects. "The intent of the statute is to exclude from its coverage only such functions as are necessary to detect and correct those defective conditions for which absolute liability will be imposed." *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260 (4th Cir. 1980); *See also, Williams v. Norfolk Southern Ry. Co.*, 126 F. Supp. 2d 986 (W. D. Va. 2000), containing a full discussion of the "in use" requirement of the Federal

Safety Appliance Act. Finally, please see, "*When Railroad Equipment is Being 'Hauled' or 'Permitted to be Hauled' or 'Used on Its Line' So As to Bring Injury or Death of Workmen Into the Purview of the Federal Safety Appliance Act*", *96 A.L.R. 2d 419, as well as "What Is A 'Train' or 'Train Movement' Within the Meaning of the Brake Provision of the Federal Safety Appliance Act — Federal Cases*", 17 A.L.R. 3d 2873.

B. A Split in the Circuits Developed as to When a Railcar Will be Found to be Out of Use.

Over the years, a split in the Circuits developed, primarily between the Fourth and Fifth Circuits, as to when a railcar will be found out of use due to "switching operations" in a railyard either prior to departure or after arriving back in the railyard. *See Trinidad v. Southern Pacific Transportation Co.*, 949 F.2d 187 (5th Cir. 1991); *Deans v. CSXT, Inc.*, 152 F.3d 326 (4th Cir. 1998). However, this Court has held that railcars temporarily stored or placed at an industrial facility during the course of a trip for purposes of loading or unloading does not take the car "out of use." This is true regardless of whether the car is physically located on tracks owned by the railroad or on tracks owned by the industrial facility. *Brady v. Terminal Ry. Assoc. of St. Louis*, 303 U.S. 101, 58 S. Ct. 426, 82 L. Ed. 614 (1936).

C. The Ruling of the District Court, and the Eleventh Circuit's Decision Affirming Same, Greatly Expands the "Out Of Use" Exception Beyond the Furthest Reaches of Prior Decisions of this Court and the Various Circuits.

The District Court's ruling, and the Eleventh Circuit's ruling affirming same, is essentially that a railcar is "out of use" so as to render the Safety Appliance Act inapplicable whenever a car is dropped off at an industrial user's facility to thereafter be moved and loaded by employees of that facility. Under such a ruling, the car would apparently remain out of use for the entire period of time that it is in the physical possession of the facility, even if an injury occurs, as in this case, when the car is on the delivering railroad's own track and actually en route to be loaded with freight at the facility.

Petitioner Dunn would respectfully submit that such a ruling greatly expands the "out of use" exception to the Safety Appliance Act far beyond the bounds established by this Court and all of the various federal courts which have considered the applicability of that exception. Such interpretation renders the Act inapplicable to essentially all rail movements except those where the car is actively being transported by the railroad between stops. In this regard, as noted above, railcars are already held to be out of use while stored for repair or maintenance and during "switching operations," where trains are being built or disassembled in the railroad's switching yard at the beginning or end of a trip. *Trinidad v. Southern Pacific*, 949 F.2d 187 (5th Cir. 1991; *Deans v. CSXT, Inc.*, 152 F.2d 326 (4th Cir. 1998). Under this exception as now further expanded, cars would also be out of use after being dropped off during a trip to be loaded at an industrial facility, regardless of the use to which the car is being put at the time of the injury.

Petitioner Dunn would submit that such result is squarely at odds with this Court's holding in *Brady v. Terminal Ry. Assoc. of St. Louis*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614 (1936). In that decision, this Court found that a railcar remained in use by the delivering railroad even after that railroad had deposited the car on another railroad's track free of its locomotive. This Court held that even though the car had been brought into another railroad's yard and had been dropped off on a receiving track to be stored pending the continuation of its trip, the car remained in use by the delivering railroad, as it had not yet proceeded to its ultimate destination.

In sum, the Courts below have now held that the Act is inapplicable during the very operations where rail workers are most likely to be injured; that is, during the operations where workers are most likely to utilize grabirons, handholds, and sill steps, the very hazards the Act was designed to address. Such a ruling, Petitioner would respectfully contend, greatly expands the not "in use" exception far beyond its intended scope, rendering the exception so broad as to swallow the rule. Needless to say, rail workers are rarely called on to ride and climb railcars, so as to utilize grabirons and still steps, while the cars are moving down mainline tracks between destinations. As the Act itself provides, it is intended, among other things, to provide safety for workers while "coupling and uncoupling" cars such as routinely occurs at industrial sidings and warehouses. 49 U.S.C. § 20302(a)-(a)(2).

D. The Act Itself Provides that It Remains Applicable to Railcars which a Railroad Allows to be Used by Third Parties. Moreover, this Court has Previously Held that the Safety Appliance Act is to be Broadly Construed, and any Exception to the Act, such as the "Not in Use" Exception, is to be Limited in its Application.

The very language of the Safety Appliance Act itself mandates that it is applicable to railcars, regardless of whether the car is utilized by the railroad itself or by third parties who reasonably may be called on to utilize the car in commerce. In this regard, the Act provides that a railroad may not "use ***or allow to be used*** on any of its railroad lines . . ." a railcar unless that car is properly equipped and affixed with the required safety appliances. 49 U.S.C. § 20302(a). (Emphasis supplied). As such, the language of the Act itself contemplates that a railcar allowed to be utilized by a third party, such as workers at an industrial plant, nonetheless remains the responsibility of the railroad providing the car for purposes of the Safety Appliance Act while the car remains on its line.

Moreover, this Court has clearly stated that the "Safety Appliance Act should be liberally construed as a safety measure." *United States v. Seaboard Air Line Ry. Co.*, 361 U.S. 78, 83, 80 S. Ct. 12, 16, 4 L. Ed. 2d 25 (1959); *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260 (4th Cir. 1980); *Williams v. Norfolk Southern Ry. Co.*, 126 F. Supp. 2d 986 (W. D. Va. 2000).

In regard to the exception to the Safety Appliance Act for cars which are not "in use" at the time of an injury, the Courts have held that "the intent of the statute is to exclude from its coverage only such functions as are necessary to

detect and correct those defective conditions under which absolute liability will be imposed." *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260 (4th Cir. 1980); *see also, Williams v. Norfolk Southern Ry. Co.*, 126 F. Supp. 2d 986 (W. D. Va. 2000).

Moreover, the precedent of this Court and any number of Courts of Appeal makes clear that not all activities which could generally be described as involving some manner of "switching" fall within the term "switching operations" so as to be beyond the reach of the Act. When the movement involved is "not shifting cars about in a yard or on isolated tracks devoted to switching operations," but rather, involves the movement of traffic down a line where cars are "exposed to hazards against which the Act was designed to afford protection," the movement is covered. These hazards were specifically held to include moving a train or a group of cars "over switches" and "over city streets, at grade, and along and over other tracks." *United States v. Seaboard Air Line Ry. Co.*, 361 U.S. 78, 83, 80 S. Ct. 12, 16, 4 L. Ed. 2d 25 (1959). "The Act applies more broadly than simply to trains en route from their origin to their destination on main line tracks. For example, a transfer train moving on a short connecting track from one train yard to another still must meet the Federal Safety Appliance Act requirements." *Phillips v. CSX*, 190 F.3d 285 (4th Cir. 1999).

As this Court has previously stated, a switching operation for purposes of the Safety Appliance Act is where there is essentially "no train" in existence. *United States v. Seaboard Air Line Ry. Co.*, 361 U.S. 78, 83, 80 S. Ct. 12, 16, 4 L. Ed. 2d 25 (1959). Therein, this Court stated, "The fact that switching preceded or followed these movements is likewise irrelevant to the statutory test. It may properly be said that

there is no train in a true switching operation. When cars of a substantial number are being received from consignors or delivered to consignees in an assembled unit of engines and cars that move a substantial distance, the operation is intrinsically no different for purposes of the Act than a mainline haul . . . ," and thus the operation does not constitute "switching" for purposes of the Act. *Id.* at 82.

Under the decision as it now stands below, this Court would necessarily have wrongly decided *Brady v. Terminal Ry. Ass'n of St. Louis*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614 (1936), as referenced above. Similarly, the Fifth Circuit would have necessarily wrongly decided *Monongahela Ry. Co. v. Black*, 235 F.2d 406 (5th Cir. 1956). There, the Fifth Circuit Court of Appeals refused to find that "a railroad is relieved of its responsibility to provide safe appliances when it places one of its cars on a sidetrack for the sole purpose of having it loaded with freight to be hauled by it." *Monongahela, supra*, at 408. Therein, the Court reiterated that the Act applies even "during switching operations that occur at sidetracks serving rail customers. . ." unless sidetracked specifically for repair or maintenance. In other words, the injury in *Monongahela*, as in the within case, occurred mid-trip, not at the beginning or end of a trip, and the car was not at the time awaiting inspection for safety appliance defects, and thus remained in use. *See also, Williams v. Norfolk Southern, supra*, at 933 and fn. 7; *Rush v. Thompson*, 202 S.W.2d 800 (1947); *United States v. Seaboard Air Line Ry. Co.*, 361 U.S. 78 at 80-82; *United States v. Northern Pacific Ry. Co.*, 254 U.S. 251, 41 S. Ct. 101, 65 L. Ed. 249 (1920).

The above decisions, Petitioner would submit, set forth standards to determine when a car remains in use for purposes

of the Safety Appliance Act in relation to an injury which takes place "mid-trip," as in the case at hand. To be distinguished from these "mid-trip" decisions are "pre-departure" decisions, dealing with injuries that occur while the car is still being assembled in the railroad's own yard *prior* to departure.

E. Pre-Departure" Decisions Relied Upon by the District Court Below Are Inapplicable to an Injury Which Occurs Mid-Trip, as in the Case at Hand.

The decisions in *Phillips v. CSX*, 190 F.3d 285 (4th Cir. 1999), *Deans v. CSXT, Inc.*, 152 F.2d 326 (4th Cir. 1998), and *Trinidad v. Southern Pacific*, 949 F.2d 187 (5th Cir. 1991), relied on by CSX and the District Court, all involved injuries occurring during switching operations in the railroad's own yard prior to an outbound inspection, and thus, prior to the railroad having an opportunity to inspect the car for Safety Appliance Act violations. As such, these "pre-departure" decisions are distinguishable from decisions as outlined above, including *Brady v. Terminal Ry. Assoc of St. Louis.*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614 (1936), and *Monongahela Ry. Co. v. Black*, 235 F.2d406 (4th Cir. 1956), where, again, the injuries took place mid-trip.

The within case obviously does not involve a pre-departure injury. The injury to Mr. Dunn occurred long after the train had been assembled and inspected in CSX's yard, twelve (12) days ***after*** CSX's delivery of the car to IP premises. Mr. Dunn would thus submit that because the *Trinidad* and *Phillips* decisions both involved pre-departure injuries, as opposed to an injury occurring mid-trip, those decisions are, at best, of limited applicability to the case at hand.

The Court in *Trinidad, supra*, articulated the very distinction that Petitioner is attempting to make in this case. The Court therein specifically stated that this Court's rationale in *Brady v. Terminal Ry. Assoc of St. Louis, supra*, as relied on by Petitioner in this case, is the rule to be applied when injuries occur mid-trip, as opposed to when injuries occur pre-departure.

> "*Brady* is distinguishable [from the facts in *Trinidad*] because 'the issue in *Brady* thus was whether the trains' 'use had ended' during this temporary stop'. [Cit.] *Brady* is inapposite to the case at bar, as this case involves whether the train had passed from the assembly stage to the 'in-use' phase. The *Brady* train was in the midst of its journey when the injury occurred; it had not been withdrawn from use. [Cit.] The Southern Pacific train, in contrast, had yet to depart for its destination when appellant was injured; it had not yet been put into use. . . ."

Trinidad, supra. "*Trains that have completed the switching process, and departed for their destinations, however, are subject to the Act's requirements,* whether or not they are actually in motion when the defect occurs." [Cits.] *Trinidad, supra.* (Emphasis supplied.)

The within case involved an injury which occurred mid-trip, as addressed in *Brady*, not *Trinidad*, or its Fourth Circuit counterparts, *Deans, supra*, and *Phillips, supra*. The injury occurred long after the car's pre-departure inspection, and long before the train reached its ultimate destination back at CSX's rail yard. As such, decisions such as *Trinidad, supra*, and *Deans, supra*, are of limited applicability to this

mid-trip injury, as was made clear by the Court in *Trinidad* itself.

However, even had the District Court and the Eleventh Circuit properly applied the *Trinidad* "bright line" rule to the case at hand, that test would clearly have been met in any event, as it was undisputed that CSX's mechanical inspection of this car had already long previously been completed prior to delivery of the car to the customer, International Paper, and the car would not be mechanically re-inspected until it returned to the CSX yard at the end of its trip. In other words, CSX already had its opportunity to inspect the car before it commenced its trip, and thus, the stated basis for the "out of use" exception, i.e., giving the railroad the opportunity to inspect the car before being subject to the Act, is not applicable.

In sum, Petitioner Dunn would submit that under controlling precedent of this Court, and decisions in the various Circuits, when a car is uncoupled from its locomotive to be deposited on a side track at an industrial facility for loading, this does not constitute a "switching operation" for purposes of taking the car from the protection of the Safety Appliance Act. The car certainly remains in use while being transported from a holding yard to a warehouse to be loaded, even if this is accomplished by third parties, such as RailServe in this case, so long as the car remains on "the line" of the delivering railroad. Again, the literal language of the Act itself imposes strict liability whenever a railroad *uses or allows* a railcar to be used by anyone on its line while containing a safety appliance defect. 49 U.S.C. § 20302.

F. Grant of Certiorari would also Allow this Court to Address the Two Competing Tests for When a Railcar Goes Out of Use for Purposes of the Safety Appliance Act as Typified by the Fourth Circuit in *Deans v. CSXT, Inc., supra*, and the Fifth Circuit rule in *Trinidad v. Southern Pacific, supra.*

The Eleventh Circuit's decision affirming the trial court's decision, which held that the railcar in the within case was out of use as a matter of law simply because it had been dropped off for loading at an industrial facility effectively ignores this Court's decisions in *Brady v. Terminal Ry. Assoc. of St. Louis*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614 (1936); *United States v. Northern Pacific Ry. Co.*, 254 U.S. 251 (1920); *United States v. Seaboard Air Line R.R. Co.*, 361 U.S 78, 83 (1959). Further, it did nothing to address the question of whether decisions dealing with injuries occurring in the railroad's own yard, either prior to the commencement of a trip or at the conclusion of a trip, such as typified by *Phillips v. CSX*, 190 F.3d 285 (4th Cir. 1999), *Deans v. CSXT, Inc.*, 152 F.2d 326 (4th Cir. 1998), *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838 (1st Cir. 1998), and *Trinidad v. Southern Pacific*, 949 F.2d 187 (5th Cir. 1991), have any applicability to an injury which occurs mid-trip at a manufacturing facility. A grant of certiorari in this case would allow the Court an opportunity to address these varying tests, even those involving injuries occurring during switching operations in the railroad's own yard, so as to establish a uniform test as to when a car is "out of use" so as to exclude it from the scope of the Act.

Obviously, the question of whether a particular car, at any given time and place, is covered by the Act could conceivably be of life-and-death importance to the person

called upon in his or her duties to handle that car. If covered, the worker may reasonably be assured that the car will be free from defects and can proceed in his or her duties in relation to the car accordingly. If it is made clear to the worker that it is *not* covered, he or she may be forewarned to govern his or her actions in relation to the car with a greater measure of caution. Thus, a uniform, easily applied rule in this regard, Petitioner would submit, would enable workers, and for that matter, railroads supplying the car, the opportunity to know exactly what measure of care is required in relation to the car so as to avoid serious injury or death to workers or others reasonably coming in contact with the car.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JUNE 7, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-13122

D.C. Docket No. 04-00025-CV-4

BRIAN DUNN,

Plaintiff-Appellant,

versus

CSX TRANSPORTATION, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(June 7, 2006)

Before TJOFLAT, BARKETT and HILL, Circuit Judges.

PER CURIAM:

After considering the parties' briefs and entertaining oral argument, we affirm the district court's judgment. For the reasons stated in the court's May 26, 2005, order granting appellee summary judgment, the record is insufficient to make out a claim under either count of appellant's complaint.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION DATED AND FILED MAY 26, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION NO. CV404-025

BRIAN DUNN,

Plaintiff,

vs.

CSX TRANSPORTATION, INC.,

Defendant.

ORDER

Before the Court is Defendant's Motion for Summary Judgment. (Doc. 49.) After careful consideration and for the reasons stated below, Defendant's motion is **GRANTED**.

BACKGROUND[1]

In this action, Plaintiff seeks to recover for injuries that he sustained while attempting to climb aboard Defendant's railcar. At the time of his injury, Plaintiff was working at International Paper Company's ("International Paper's")

1. In this Order, the facts are viewed in the light most favorable to Plaintiff, the non-moving party.

paper manufacturing mill in Savannah, Georgia, as an employee of Railserve, Inc. ("Railserve"). Railserve provides rail switching services through a contract with International Paper. Railcars are delivered to International Paper's premises and are deposited on a receiving track by one of three railroads servicing the paper mill, Norfolk Southern Railway, Georgia Central Railway, or Defendant. Railserve then moves the railcars in and around a holding yard and "classifies" the cars into "cuts" on separate tracks, essentially grouping cars based on factors including type and size. The cuts remain in the holding yard until Railserve moves them to be loaded or for some other reason. Once a cut of cars is loaded, Railserve moves it to an outgoing track, where it is assembled into a full train that is picked up by Defendant or another railroad. Railserve uses its own locomotives and equipment to move the cars.

Defendant transported the car on which Plaintiff was injured, Defendant's boxcar number 161135 ("car 161135" or "the car"), to International Paper's premises on the morning of January 5, 2003, as part of a 35-car train. Before leaving Defendant's yard for the paper mill, the train underwent an inspection by one of Defendant's certified inspectors. The train arrived at International Paper's receiving track at 10:00 a.m. Though there is no record of what happened with car 161135 in the twelve days between its delivery and the evening Plaintiff was injured, the car was apparently classified and stored by Railserve in International Paper's holding yard.

On the evening Plaintiff was injured, January 17, 2003, Plaintiff was the foreman of a three-man crew transporting a

cut of six to eight empty boxcars, including car 161135, from International Paper's holding yard to a warehouse where it was to be loaded. The crew pushed the cars with one of Railserve's locomotives on a track leased by Defendant on International Paper's premises. As the cars approached a road, Plaintiff stepped off to warn approaching motorists by flagging the crossing. Plaintiff then attempted to step back onto car number 161135. He placed his foot on the lower rung of a ladder which hangs below the car and grasped a grab iron on the side of the car with his left hand. The grab iron gave way and Plaintiff began to fall away from the car. He grasped the next highest grab iron with his right hand and was left hanging from the side of the moving car. After the cars were brought to a stop, Plaintiff discovered that one of the bolts or hucks attaching the grab iron to car 161135 was missing, and, therefore, the grab iron was not secured at one end.

The accident resulted in injury to Plaintiff's right wrist and caused him mental and physical pain and suffering as well as lost income. Seeking to recover for these injuries, Plaintiff filed his Complaint in the State Court of Chatham County, Georgia. In Count One, he claims that Defendant was negligent in its inspection and maintenance of car 161135 and in failing to warn Plaintiff of the danger of the defective grab iron. (Complaint, ¶ 6.) In Count Two, he claims that the defective grab iron constituted a violation of the Safety Appliance Act, 49 U.S.C. § 20301 *et seq.*, giving rise to liability under the doctrine of negligence per se. (Complaint, ¶ 12.) Defendant removed the case to this Court based on diversity of citizenship and now moves for summary judgment on both counts.

Appendix B

ANALYSIS

I. *Standard of Review*

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56 (c) . The "purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (quoting Fed. R. Civ. P. 56 advisory committee's note). Summary judgment is appropriate when the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). The law governing the action determines whether an element is essential. *DeLong Equip. Co. v. Washington Mill Abrasive Co.*, 887 F.2d 1499, 1505 (11th Cir. 1989).

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The burden then shifts to the nonmovant to establish, by going beyond the pleadings, that there is a

genuine issue as to facts material to the nonmovant's case. *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1583 n.16 (11th Cir. 1991). A dispute of material fact "is genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248. However, if the nonmoving party's response to the summary judgment motion consists of nothing more than mere conclusory allegations, then the court must enter summary judgment in the moving party's favor. *Pepper v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, [then] there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587.

In assessing whether Defendant is entitled to summary judgment, the Court must review the evidence and all reasonable factual inferences arising from it in the light most favorable to Plaintiff. *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir. 1992). The Court must avoid weighing conflicting evidence. *Liberty Lobby*, 477 U.S. at 255; *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 934 (11th Cir. 1987). A mere "scintilla" of evidence supporting the opposing party's position, however, will not suffice. *See, e.g., Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). Nevertheless, where a reasonable fact finder may "draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment." *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989) (citation omitted). In light of this standard, the Court will now address Defendants' arguments for summary judgment as to each of Plaintiff's counts.

Appendix B

II. *Plaintiff's Count of Common Law Negligence*

In order to maintain a cause of action for negligence, Plaintiff must show that Defendant breached a "legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm." *Bradley Ctr. v. Wessner*, 250 Ga. 199, 200, 296 S.E.2d 693, 695 (1982).

> "The mere fact that an accident happened and the plaintiff may have sustained injuries or damages affords no basis for recovery against a particular defendant unless the plaintiff carries the burden of proof and shows that such accident and damages were caused by specific acts of negligence on the part of that defendant."

McQuaig v. Tarrant, 269 Ga. App. 236, 237, 603 S.E.2d 751, 752 (2004). Plaintiff attempts to make such a showing with allegations that Defendant's negligent inspection and maintenance of car 161135 and its failure to warn Plaintiff of the grab iron's condition resulted in his injury.

The success of these allegations hinges on whether the grab iron became unstable before or after Defendant delivered the car to International Paper on January 3, 2003. If the grab iron was damaged after delivery, then Defendant would have had no opportunity to detect the damage. Accordingly, Defendant could not be charged with failing to discover the damage during its inspection on the morning of the delivery, failing to maintain the car in a safe condition, or failing to warn Plaintiff of the grab iron's condition. As Plaintiff

recognizes, "the negligence issue then boils down to *when* the damage to the car occurred . . . ." (Pl.'s Br. in Opp. to Def. M. for Summ. J. at 25) (emphasis in the original).

In an attempt to show that the damage most likely occurred before the car's arrival at International Paper's premises, Plaintiff offers the opinion of Charles Hester, an inspector and repairman of railcars. Mr. Hester states that the bolt or huck attaching the grab iron to the car was "clearly missing before the car was delivered to International Paper premises and delivered to those premises by CSX." (Supp. Ex. Wit. Rep. of Charles Hester at 6.)[2] However, Mr. Hester's opinion does not pass the "rigorous three part inquiry" that the Court must apply to expert testimony to determine if it complies with Federal Rule of Evidence 702. *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004.) Pursuant to *Frazier*, Mr. Hester's opinion is only admissible if: (1) if he is qualified to competently testify on the matters he addresses; (2) if the methodology he uses to reach his conclusions is sufficiently reliable as required by *Daubert v. Merrell Dowell Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 429 (1993); and (3) if the proffered testimony would assist the jury through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *Id.* at 1260.

While the record contains evidence that Mr. Hester was qualified to testify as to how railcars should be inspected

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2. Mr. Hester 's supplemental report is Exhibit A to Defendant's "Memorandum in Support of Defendant's Motion to Exclude Expert Witness Charles Hester."

and repaired, Plaintiff has failed to offer any evidence that Mr. Hester's training, education, or experience qualifies him to offer an opinion on the age of metal damage. Moreover, Mr. Hester's methodology does not reach the standard of reliability required by *Daubert*. Mr. Hester concludes that the damage to the grab iron must have occurred before the railcar reached International Paper's premises because there are no reports of damage to the car by any Railserve employees. (Hester Dep. at 161.) However, he concedes that he did not consider that the defect was also not noted in Defendant's reporting system despite numerous inspections. He admits that he has no reason to believe that Defendant's reporting system was inferior to that of Railserve. (*Id.* at 176-77.) Accordingly, Mr. Hester fails to explain why he gives such substantial weight to the silence in Railserve's records while giving no weight to the silence in Defendant's records. (*Id.* 176-77.)

Mr. Hester also fails to take into consideration the chance that the car was damaged after delivery but outside the presence or awareness of Railserve's employees. *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001) ("[I]f an expert utterly fails to consider alternative causes or fails to offer an explanation for why the proffered alternative cause is not the sole cause, a district court is justified in excluding the expert's testimony."). Additionally, he states that he cannot tell if the bolt or huck was missing due to improper assembly or repair or if it was damaged by a forklift or other moving object. (Supp. Ex. Wit. Rep. of Charles Hester at 6.) The Court finds it hard to see how Mr. Hester could assist the jury in determining *when* the grab iron became unsecured when he cannot determine *how* it became

unsecured. Accordingly, Plaintiff cannot use Mr. Hester's opinion to establish that the grab iron became unstable before the car's arrival at International Paper's premises.

Plaintiff's claims are also not supported by his allegations that rust surrounding the grab iron "did not look fresh" and that "there were no fresh gouge or scrape marks around the hole." (Pl.'s Br. in Opp. to Def.'s M. for Summ. J. at 7). Plaintiff bases these contentions on the testimony on William Black, an employee of International Paper. However, Plaintiff has not shown that Mr. Black is qualified to testify as to the age of rust or metal damage. Further, even if Mr. Black's opinion on the time of damage was admissible, he concluded that the grab iron became unstable "ten days or longer" before Plaintiff's accident. (William Black Dep. at 97.) The parties agree that Defendant delivered the railcar to International Paper twelve days before the accident. Accordingly, Mr. Black's speculation does not lead to a rational conclusion that the damage to the grab iron occurred prior to its arrival at International Paper.

Plaintiff also emphasizes that the grab iron was unstable and that Defendant had inspected the box car twelve days earlier. However, these facts alone cannot create a reasonable inference of negligence on the part of Defendant. *See Ken Thomas of Georgia, Inc., v. Halim*, 266 Ga. App. 570, 575, 597 S.E.2d 615, 619 (2004) (negligence cannot reasonably be inferred from evidence showing that Defendant previously maintained vehicle that later suffered mechanical malfunction). Moreover, the Court cannot infer negligence from the facts that Defendant owned car 161135 and that the car was on its track at the time of the injury. To do so would

essentially amount to an improper finding of res ipsa loquitur when the car was clearly not in Defendant's "exclusive control" up to the moment of Defendant's injury. *See Feazell v. Gregg*, 270 Ga. App. 651, 656, 607 S.E.2d 253, 258 (2005).

"When a party is relying on inferences to prove a point, not only must those inferences tend in some proximate degree to establish the conclusion sought, but must also render less probable all inconsistent conclusions." *Page v. Atlanta Ct. Ltd*, 219 Ga. App. 422, 424, 465 S.E.2d 456, 458 (1995). The evidence in this case does not tend to establish that the grab iron was damaged before Defendant delivered car 161135 to International Paper. Nor does it render less probable the conclusion that the grab iron was damaged during the twelve days prior to Plaintiff's injury. "At best, it supports an inconclusive inference or one based on mere conjecture that is not sufficient to create an issue of fact." *Ken Thomas, Inc.*, 266 Ga. App. at 574, 597 S.E.2d at 619 (internal citations and quotations omitted). Accordingly, Plaintiff has failed to produce evidence from which a rational jury could conclude that Defendant was negligent in its inspection or maintenance of car 161135. Defendant's motion for summary judgment on Plaintiff's common law negligence claim is, therefore, **GRANTED**.

III. *Plaintiff's Count of Negligence Per Se*

Under Georgia law, Plaintiff can make a claim of negligence per se if (1) Defendant violated a statute; (2) Plaintiff is a member of the class that the statute was intended to protect; and (3) the harm that Plaintiff complains of was the type of harm that the statute was designed to

prevent. *Hubbard v. Dept. of Transp.*, 256 Ga. App. 342, 349-350, 568 S.E.2d 559, 566-67 (2004). Plaintiff attempts to meet the first of these three elements by alleging that Defendant violated the Safety Appliance Act, 49 U.S.C. § 20302(a). Subsection 20302(a) provides that a railroad "may use or allow to be used . . . a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles." Defendant responds that it did not violate Subsection 20302 (a) because car 161135 was not covered by the Safety Appliance Act at the time of Plaintiff's injury.

As Congress has amended the language of the Safety Appliance Act a number of times since it was first enacted in 1893, courts have struggled with determining the coverage of the Act. *Compare, e.g., United States v. Seaboard Airline R&R Co.*, 361 U.S. 78, 80, 80 S. Ct. 12, 15, 4 L. Ed. 2d 25 (1959) (Act does not apply to cars being switched or classified in order to make up train); *U.S. v. Northern Pac. Ry. Co.*, 254 U.S. 251, 254-55, 41 S. Ct. 101, 102, 65 L. Ed. 2d. 249 (1920) (Act applicable to transfer trains operated between yards). Recently, courts have focused on whether a railcar was "in use" at the time of a plaintiff's injury in order to determine if the Safety Appliance Act applies. *See, e.g., Phillips v. CSX Transp., Inc.*, 190 F.3d 285 (4th Cir. 1999); *Trinidad v. S. Pac. Transp. Co.*, 949 F.2d 187 (5th Cir. 1991) (both citing *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10, 13, 58 S. Ct. 426, 428, 82 L. Ed. 614 (1938)).

In *Phillips* and *Trinidad*, the Fourth and Fifth Circuits outlined differing approaches to determining if a railcar is

"in use." The Fourth Circuit conducted a multi-factor analysis while the Fifth Circuit adopted a bright line test. *Phillips*, at 289 (citing *Deans v. CSX Transp., Inc.*, 152 F.3d 326, 329 (4th Cir. 1998)); *Trinidad*, at 189. The Eleventh Circuit has never addressed the coverage of the Safety Appliance Act and, therefore, has not indicated which of these approaches it would follow. The Court need not speculate on that issue in this case because, under either approach, car 161135 was not "in use" for purposes of the Safety Appliance Act at the time of Plaintiff's injury.

In *Phillips*, the Fourth Circuit found that a fully assembled train waiting in the railroad's yard prior to departure was not in use. *Phillips*, 190 F.3d at 290. The court focused on the facts that the Defendant was a member of the yard crew involved in switching operations, that departure was not imminent, and that the train had yet to undergo its predeparture inspection. *Id.* The same factors lead to a conclusion that car 161135 was not "in use" at the time of Plaintiff's injury. Like the plaintiff in *Phillips*, Plaintiff's primary responsibilities involved the switching rather than the transportation of railcars. Moreover, the car was not awaiting imminent departure from the mill. Rather, it was on its way to be loaded and was not even part of an assembled train. Lastly, and perhaps most importantly, Defendant had not yet had an opportunity to conduct a pre-departure inspection of the car. As the court noted in *Philips*, the "in use" requirement is intended to give railroads the opportunity to inspect and correct defects before being held liable. *Id.* This intent would be frustrated if Defendant were held liable under the Act for damage on a railcar that had been out of its possession for twelve days.

Appendix B

The inapplicability of the Safety Appliance Act to car 161135 is even clearer under the Fifth Circuit's approach. In *Trinidad*, the court developed a bright line test that a car was not "in use" unless it was part of a fully assembled train that had undergone a complete predeparture inspection. *Trinidad*, at 188. As noted above, car 161135 was clearly not part of a fully assembled train at the time of Plaintiff's injury, and it had not undergone a predeparture inspection. Plaintiff argues otherwise by noting that the car was part of an inspected train twelve days before his accident before it was delivered to the mill. This argument ignores the fact that the car must have been "in use" at the time of Plaintiff's accident in order for the Safety Appliance Act to apply. *Id.* at 188 (framing relevant time for "in use" inquiry as "the time of Appellant's accident"). Further, the apparent premise of Plaintiff's argument is that a boxcar is forever "in use" as long as it had been inspected as part of a fully assembled train at some time in the past. This argument contradicts the Fifth Circuit's stance that boxcars go in and out of use as they pass through the various stages of the railroad process. *See Id.*, at 188-89. Accordingly, Plaintiff's claim that Defendant violated the Safety Appliance Act fails the bright line test applied in *Trinidad.*

Plaintiff's negligence per se claim is also not supported by Judge Edenfield's ruling in *Rouse v. CSX Transportation, Inc.*, 722 F. Supp. 751 (S.D. Ga. 1989).[3] The plaintiff in *Rouse*

3. Despite Plaintiff's indications to the contrary, even if *Rouse* did support his claim, this Court would not be bound to follow Judge Edenfield's decision. *Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) (district court judges are not bound by opinions of other district court judges, even judges in same district).

was injured by a defective handbrake on Defendant CSX's boxcar while working at the same mill where Plaintiff Dunn was injured. Judge Edenfield held that the Safety Appliance Act supported Plaintiff's claim of negligence per se. *Rouse*, at 754-56. However, Judge Edenfield only addressed the requirement that the boxcar be "on the defendant's line" and was apparently not presented with the issue of whether the car was "in use." *Id.*

Furthermore, even if *Rouse's* "on line" analysis could be applied to the "in use" issue raised by Defendant in the present case, that application would weigh in Defendant's favor. Judge Edenfield stated that the "overarching question is one of control of the freight cars." *Id.* at 755. In this case, it is undisputed that Railserve decided how car 161135 was classified and moved around International Paper's holding yard and that it performed these tasks using its own locomotives. Additionally, International Paper's transportation analyst stated that International Paper typically performs repairs to damaged railcars on its premises even if the railcars are owned by Defendant. (Aff. of William Michael Black, ¶ 6). Consequently, Defendant relinquished control of car 161135 upon delivery to International Paper's receiving track on January 5, 2003, and did not regain control until after Plaintiff's accident.

Accordingly, Plaintiff has failed to establish that car 161135 was covered by the Safety Appliance Act under the control analysis employed by Judge Edenfield in *Rouse*, the Fifth Circuit's bright line test laid out in *Trinidad*, or the Fourth Circuit's multi-factor approach in *Phillips*. The Court, therefore, finds that Plaintiff has failed to create a genuine

issue as to whether Defendant violated the Safety Appliance Act. For this reason, Defendant's motion for summary judgment on Plaintiff's claim of negligence per se is **GRANTED**.

CONCLUSION

After careful consideration, the Court finds that Defendant's Motion for Summary Judgment is fatal to Plaintiff's case. Plaintiff has not produced evidence that could lead a rational jury to conclude that his injuries were caused by any negligence of Defendant in inspecting and maintaining the grab iron. Accordingly, Defendant's motion for summary judgment on Plaintiff's common law negligence claim is **GRANTED**, and Count One of Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**. Further, car 161135 was not covered by the Safety Appliance Act at the time of Plaintiff's injury. Consequently, Defendant's motion for summary judgment on Plaintiff's claim of negligence per se is also **GRANTED,** and Count Two is also **DISMISSED WITH PREJUDICE.** The Clerk of the Court is **DIRECTED** to **CLOSE** this case.[4]

SO ORDERED this 26th day of May, 2005.

s/ William T. Moore, Jr.
WILLIAM T. MOORE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

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4. All other pending motions in this matter are **DENIED** as moot.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 31, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-13122-JJ

BRIAN DUNN,

Plaintiff-Appellant,

versus

CSX TRANSPORTATION, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, BARKETT and HILL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

Appendix C

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE